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No. 95-1151

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID J. RAGAN,

Petitioner,

v.

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in its application of the well-settled standards governing summary judgment practice to the facts of this defamation case, where the court of appeals determined that the moving parties had adequately identified qualified privilege as an uncontested issue on which petitioner bore the burden of proof and that petitioner had failed to identify any evidence sufficient to overcome that privilege.

2. Whether, on the facts of this case, the court of appeals erred in its application of the Texas state-law doctrine of qualified privilege to petitioner's defamation claims, where the court recognized a qualified privilege for past and present employers to discuss an employee and held that petitioner had failed to identify any evidence sufficient to overcome that privilege.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, Joe O. Ragan was a party to the proceedings in the Fifth Circuit. Joe O. Ragan has filed a separate petition for certiorari with this Court, No. 95-1147.

Pursuant to S. Ct. R. 29.6, respondents state that Continental Grain Company has no parent company. Continental Grain Company has one non-wholly owned subsidiary, ContiFinancial Corporation, which is a consolidated subsidiary the stock of which is publicly traded. The parent company of ContiCommodity Services, Inc., is Continental Grain Company; ContiCommodity Services, Inc., has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	2
COUNTERSTATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	8
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Beatty v. WMATA, 860 F.2d 1117 (D.C. Cir. 1988) 12
Butner v. United States, 440 U.S. 48 (1979) 14
Casso v. Brand, 776 S.W.2d 551 (Tex. 1989) 14, 15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9, 10, 11, 12
Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138 (5th Cir. 1993) 12
City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979) 15
Fano v. O'Neill, 806 F.2d 1262 (5th Cir. 1987) 12
Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771 (Tex. 1994) 14, 15
Hanna v. Plumer, 380 U.S. 460 (1965) 14
Haring v. Prosise, 462 U.S. 806 (1983) 14
Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183 (5th Cir. 1990) 12
Huddleston v. Dwyer, 322 U.S. 232 (1944) 14
In re ContiCommodity Services, Inc., Securities Litig., 733 F. Supp. 1555 (N.D. Ill. 1990), *rev'd in part, Brown v. United States*, 976 F.2d 1104 (7th Cir. 1992) (Opp. App. 1a) 2
Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) 11
Matter of Lewisville Properties, Inc., 849 F.2d 946 (5th Cir. 1988) 12
New York Times v. Sullivan, 376 U.S. 254 (1964) 2, 13
Schauer v. Memorial Care Systems, 856 S.W.2d 437 (Tex. App. Houston [1st Dist.] 1993) 8
St. Amgnt v. Thompson, 390 U.S. 727 (1968) 16
United States v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991) 12

RULES

Fed. R. Civ. P. 54(b) 3
Fed. R. Civ. P. 56 10
Fed. R. Civ. P. 56(a) 10
Fed. R. Civ. P. 56(b) 10
Fed. R. Civ. P. 56(c) 10
Fed. R. Civ. P. 56(f) 13

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BRIEF IN OPPOSITION

ContiCommodity Services, Inc. ("Conti") and Continental Grain Company ("Continental") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner David J. Ragan.[1] Because the petition raises no important issue of federal law, it should be denied. First, petitioner's initial assertion that the Fifth Circuit misinterpreted or contradicted the well-settled law governing summary judgment procedure is

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[1] Joe O. Ragan, the father of David Ragan and also a party below, has filed a separate petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in this case; that petition has been assigned No. 95-1147.

demonstrably incorrect. The court of appeals correctly stated the law, and, in reality, the petition presents nothing more than a claim that the Fifth Circuit misapplied that law to the facts of the case before it. That question does not warrant a grant of certiorari. Moreover, the claim is baseless; the Fifth Circuit correctly applied Rule 56 to this case in all respects.

Second, petitioner's additional assertion that the decision below is in tension with *New York Times v. Sullivan*, 376 U.S. 254 (1964), is similarly unfounded. This case involves no issues arising under the first amendment, but rather rests entirely upon principles of state tort law. The court of appeals held (and petitioner does not challenge) that the state-law qualified privilege for communications between parties with a common interest in a subject matter—such as two employers discussing an employee (as was the case here)—applied to the allegedly defamatory statements in this case. The court also held that petitioner, who bore the burden of overcoming the privilege, had presented no evidence to satisfy that burden. Summary judgment was therefore appropriate. Although the Texas law of qualified privilege includes an "actual malice" element similar to that recognized under the first amendment in *New York Times*, the Fifth Circuit's decision presents only an issue of state law. There is, therefore, no issue warranting review by writ of certiorari.

DECISIONS BELOW

In addition to the decision of the United States Court of Appeals for the Fifth Circuit referenced in the petition, the United States District Court for the Northern District of Illinois issued a reported decision on certain summary judgment motions, including a summary judgment motion directed at claims asserted by petitioner, during the multidistrict phase of this litigation. *In re ContiCommodity Services, Inc., Securities Litig.*, 733 F. Supp. 1555 (N.D. Ill. 1990), *rev'd in part, Brown v. United States*, 976

F.2d 1104 (7th Cir. 1992). That decision is reproduced in the appendix to this opposition brief, Opp. App. 1a-49a.[2] Following the multidistrict phase of this litigation, this case was transferred to the United States District Court for the Southern District of Texas for further proceedings. That court entered judgment in favor of Conti and Continental on petitioner's remaining claims, pursuant to Fed. R. Civ. P. 54(b), on April 14, 1994. Opp. App. 56a-57a. That judgment incorporated orders entered by the United States District Court for the Southern District of Texas on July 16, 1993 (Opp. App. 50a-51a) and March 25, 1994 (Opp. App. 52a-55a).

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case largely recounts aspects of this long-lived litigation which neither the district courts nor the court of appeals considered relevant to the issues they decided and which, as a result, are discussed nowhere in any of the opinions below. The principal facts that petitioner correctly states are that Conti employed petitioner as chief trader at its Conti-Arbitrage Houston ("CAH") office; that Conti ordered that all of the customer accounts at CAH be closed; that petitioner initially refused to do so; that petitioner, after finally closing the securities and commodity futures positions in the customer accounts, immediately and over Conti's objection began to work at Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"); and that personnel from Conti and Merrill Lynch had a conversation regarding petitioner, during which certain Conti representatives stated their beliefs regarding petitioner's performance during his employment at Conti.

Aside from these facts, the overwhelming balance of petitioner's statement of the case is either irrelevant or

[2] The Seventh Circuit's decision concerned only certain suits for tax refunds, not the case at issue in the petition, and is therefore not reproduced.

contrived. To place the petition in proper context requires brief correction or supplementation of that statement in four important regards. First, Conti closed its CAH office and its customers' accounts after it and its customers suffered multi-million dollar losses as a consequence of petitioner's trading at CAH, and Conti was completely within its rights in so doing. Second, personnel from Conti met with petitioner's subsequent employer, Merrill Lynch, primarily because petitioner had left CAH before completing necessary bookkeeping. In the course of that meeting, Conti representatives discussed their beliefs concerning petitioner's performance during his employment with Conti.[3] Third, this particular litigation began when Conti and Continental sued petitioner and his father, Joe Ragan, alleging that petitioner illegally manipulated customer accounts, including fraudulently allocating trades and funneling millions of dollars from Conti through his father's account to petitioner himself. Finally, although the district court granted summary judgment for Conti and Continental on a ground subsequently nullified by the court of appeals in a separate decision, the decision below rests on an alternative ground that was properly presented to the district court and that was fully briefed before the court of appeals.

1. Conti closed its CAH office after, as the court of appeals noted, "Conti's Houston branch office had incurred more than $55 million in trading losses for the accounts of its arbitrage and speculative customers." App. 4A n.3; *see also* Pet., p. 4 & n.3 (conceding that Conti had paid securities dealers for trading losses of $55 million). In his sole remaining claim here, petitioner does not

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[3] In this regard, petitioner's attempt to portray Conti's actions as a campaign to "blame" him for losses at CAH (Pet., pp. 5-6) is completely inaccurate, although Conti believes that petitioner in fact was responsible for those losses. In particular, petitioner alleges first that Conti threatened petitioner "with the loss of his trading license and the ruin of his career" (Pet., pp. 5-6), but then concedes one page later that the Chicago Board of Trade, after investigating his activities, "summarily suspended" petitioner's license (Pet., p. 7).

allege—and no court has ever found—that Conti acted other than within its rights in closing the customer accounts at CAH.

Petitioner attempts to suggest, however, that Conti and Continental acted improperly in closing the accounts by asserting in his petition that the positions he established for CAH's customers were guaranteed to yield a profit. *See, e.g.*, Pet., p. 2 ("[g]overnment securities have fixed maturity dates and values[;] [a]s a result, the customer loans were always repaid, and profits were realized"); *id.*, p. 4 & n.3. But these assertions ignore the use of repurchase agreements to finance the trading positions, which created financing costs for the customers, and the real costs Conti incurred as a result of the money-losing customer trades. Moreover, the success or failure of petitioner's trading strategy in no way bears on the ground on which the court below rested its decision—that petitioner had failed to produce evidence sufficient to create an issue of fact on the privileged nature of Conti's alleged communications.[4]

2. One day following CAH's closing, petitioner submitted a letter of resignation to Conti and, on June 7, 1984, began working for Merrill Lynch. Pet., p. 4. Conti refused to accept petitioner's resignation because, although he had finally liquidated the positions in customer accounts at CAH, significant recordkeeping work remained to be done.[5] On June 29, 1984, representatives of Conti met with representatives of Merrill Lynch to discuss Conti's efforts to resolve the recordkeeping problems petitioner had left behind.[6] During that meeting, Conti representa-

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[4] Petitioner suggests, with the benefit of hindsight (Pet., p. 4 n.3), that the customers' securities positions would have yielded a net profit if they had not been liquidated. At the time the accounts were closed, however, Conti could not foresee the change in interest rates that later occurred.

[5] These facts could be established by reference to: DK No. 1535-24: ¶ 919; DK No. 1543-4: ¶ 285; DK No. 1534-14: ¶ 508.

[6] DK No. 1543-4: ¶¶ 288-89.

tives also informed Merrill Lynch of their belief that petitioner's trading had resulted in substantial losses that had required Continental to inject over $40 million in capital into Conti.[7] On June 30, 1984, Merrill Lynch fired petitioner because he had told Merrill Lynch that his CAH trading was profitable when, in fact, it had resulted in substantial losses that required Continental to infuse capital into Conti.[8]

3. This particular piece of the complex litigation arising from the closing of CAH began when "Conti filed suit against David Ragan, alleging fraudulent and fictitious transactions." App. 5A; *see also* Opp. App. 3a ("Conti . . . claims the customer parties conspired with David Ragan to have profitable trades allocated to them and that this resulted in Conti having to reimburse customers who received the loss side of the trades."). Conti's claims against petitioner remain pending in the Southern District of Texas.[9]

4. As the Fifth Circuit noted, petitioner counterclaimed against Conti and Continental based upon his termination and Conti's contact with Merrill Lynch, alleging breach of contract, tortious interference with contract, tortious interference with prospective contract, defamation, and fraudulent concealment. App. 5A. District Judge Hart of the Northern District of Illinois, before whom the Judicial Panel on Multidistrict Litigation had consolidated this and other cases arising from petitioner's actions at CAH, granted Conti and Continental summary judg-

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[7] DK No. 1543-4: ¶ 290.

[8] Supplemental Fifth Circuit Record, Vorst Dep., pp. 229-30, 660-61.

[9] Conti does not intend to dismiss those claims until the resolution of a malicious prosecution suit, instituted by petitioner *after* oral argument to the Fifth Circuit, in Illinois state court against Conti, Continental, and their attorneys and accountants. *Compare* Pet., p. 11 n.4.

ment on all of petitioner's claims except for the defamation claim and the tortious interference with contract claim, both of which were based upon the meeting with Merrill Lynch. Opp. App. 38a-44a.

After this case was returned to the Southern District of Texas upon completion of the multidistrict phase of the litigation, Conti and Continental moved for summary judgment on the remaining tortious interference and defamation counts. Conti and Continental primarily argued that petitioner's intervening criminal conviction established the truth of the alleged statements to Merrill Lynch. However, as petitioner concedes, Conti and Continental also argued to the district court that the statements allegedly made to Merrill Lynch were qualifiedly privileged. *See* Pet., p. 10. Indeed, petitioner also concedes that he responded to that argument in the district court. *See* Pet., p. 11 ("Ragan further responded to Conti's and Continental's reference to their purported 'good faith' ").

Chief Judge Norman Black granted Conti and Continental summary judgment on petitioner's defamation and tortious interference counts on the ground that petitioner's criminal conviction (later reversed on appeal) established the truth of the alleged statements to Merrill Lynch. *See* Opp. App. 50a-51a; App. 7A. The Fifth Circuit's subsequent reversal of petitioner's criminal conviction (*see* App. 9A n.7) nullified that ground for decision while petitioner's appeal to the Fifth Circuit was pending in this case. As a result, Conti and Continental argued in their brief to the court of appeals that it should affirm on the alternative ground they had presented to the district court: that the alleged statements made by Conti's representatives to Merrill Lynch were qualifiedly privileged and that petitioner had identified no evidence to overcome that privilege. *See* Pet., pp. 12-15. Before the court of appeals, petitioner argued (as he does here) that Conti and Continental had not adequately presented that argument to the district court. *See* Pet., pp. 15-16. Petitioner also argued

(again as he does here) that the record evidence in fact overcame any qualified privilege. *See* Pet., pp. 16-17.

Notwithstanding these arguments, the Fifth Circuit affirmed the grant of summary judgment, holding that statements made during the meeting with Merrill Lynch were shielded by a qualified privilege (which is applicable both to the defamation and tortious interference claims) and that petitioner had failed to identify any evidence that could overcome that privilege. App. 9A-13A. In particular, relying on Texas law, the Fifth Circuit held that "[a]ccusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege." App. 9A (citing *Schauer v. Memorial Care Systems,* 856 S.W.2d 437, 449 (Tex. App. Houston [1st Dist.] 1993)). The Fifth Circuit further held that "Texas law places on the plaintiff the burden of proof at trial with respect to [the showing of actual] malice" (App. 10A) necessary to overcome the qualified privilege and that, with respect to his defamation claim, petitioner "ha[d] not made a showing that is sufficient to constitute the 'clear evidence' of malice required to defeat a properly supported motion for summary judgment" (App. 11A). For the same reason, the court of appeals "also conclude[d] that Ragan ha[d] not shown a genuine issue of fact as to the 'malicious and intentional action' element in his tortious interference claims." App. 13A.

REASONS FOR DENYING THE PETITION

The petition raises no important issue of federal law. First, the court of appeals correctly articulated the well-settled legal principles governing the parties' respective burdens at the summary judgment stage. Although petitioner attempts to make it appear otherwise, his real argument here is that the court of appeals misapplied the principles that it stated. But, the court of appeals correctly applied those principles to the facts of this case, and

even if it had not, that question would not warrant the exercise of this Court's certiorari jurisdiction. The petition does not suggest any conflict between the decision below and any decision of this Court or any other court of appeals. The most petitioner can say is that is that "[*i*]*f* this published decision begins to [be] followed within the Fifth Circuit or is picked up by other Circuits, then these issues will have significance far beyond this case." Pet., p. 21 (emphasis added). Petitioner's assertion is wrong and is, in any event, far too thin a reed on which to rest a request for a writ of certiorari.

Second, the court of appeals' decision on the merits of the qualified privilege issue raises only an issue of Texas state law. And, in this regard, the Fifth Circuit both correctly stated the Texas law and correctly applied it to the facts of this case. Petitioner's attempt to suggest that the court of appeals' decision on this issue implicates the constitutional doctrine of actual malice under *New York Times v. Sullivan* is baseless. The petition should be denied.

1. Although the standards governing the burdens of a party moving for summary judgment may present "substantial questions of civil procedure" (Pet. p. 20), the issues the petition purports to raise in this case have been settled under Fed. R. Civ. P. 56 and this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The petition asserts that this Court must address "[w]hether . . . a movant may carry the burden of a summary judgment motion simply by asserting generally that the non-movant lacks evidence of an element of his claim . . . without specifying what acts the purported lack of evidence relates to and/or what portion of the record allegedly indicates that lack of evidence." Pet., p. i; *see id.*, p. 20 (identifying question as "what a summary judgment movant must do to sufficiently identify . . . uncontested issues of fact defeating one or more elements of the non-movant's

case and what, if any record evidence he must identify to show that those issues are uncontested").

But the petition's asserted question is completely answered by Rule 56 and *Celotex*. Rule 56 makes clear that a party moving for summary judgment need not submit any evidence in order to present a proper motion. Fed. R. Civ. P. 56(a) ("[a] party . . . may . . . move with or without supporting affidavits for a summary judgment"); Fed. R. Civ. P. 56(b) (same). *See also* Pet., p. 22. And in *Celotex*, the Court expressly held that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." 477 U.S. at 322.

Moreover, this Court in *Celotex* directly addressed the nature of the "showing" that a party must make when moving for summary judgment. This Court first held that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. Nevertheless, this Court made clear that, where the nonmoving party bears the ultimate burden of proof on an issue, the required "showing" is a relatively low standard of "pointing out" that no evidence exists to create a contested issue of fact. "[T]he burden on the moving party may be discharged by 'showing'—*that is, pointing out to the district court*—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325 (emphasis added). Rejecting precisely the claim petitioner makes here, the Court further explained that there is "no express or implied requirement in

Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 323. *See also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990) ("*Celotex* made clear that Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case").[10]

Finally, the supposed worst-case scenario that the petition puts forth—whether a "movant may simply stand up and say the nonmovant has no case and [not] explain what particular aspect of the case is under fire" (Pet., p. 20)—was directly answered by *Celotex*. This Court made clear in *Celotex* that a party moving for summary judgment must specifically identify for the district court a "dispositive issue" on which "the nonmoving party will bear the burden of proof at trial," 477 U.S. at 324, and point out to the court that there is an absence of evidence in the nonmovant's favor on that issue, *id.* at 325. Numerous courts of appeals, including the Fifth Circuit, have recognized this requirement and have squarely held that an unsupported conclusory assertion that the plaintiff simply has no case—the hypothetical scenario petitioner urges this Court to consider here—is not sufficient under Rule 56.[11]

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[10] The Court also noted in *Celotex* that the "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." 477 U.S. at 326. In these circumstances, which are governed by the same rules as summary judgments sought by parties, the district court of course does not make any "showing," but merely directs one party to offer any evidence it may have to support an issue on which it will bear the burden of proof.

[11] Justice White made the same point in his concurring opinion in *Celotex*: "It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." 477 U.S. at 328 (White, J., concurring). The courts of appeals have referenced Justice White's concurrence as well as the Court's opinion in explicating the requirements of Rule 56. *See, e.g.*,

2. Nothing in the court of appeals' decision contradicts these well-settled principles. Citing *Celotex*, the Fifth Circuit correctly explained that "[s]ummary judgment is appropriate when the moving party shows that there is no genuine issue of material fact. The moving party may make this showing by pointing out the lack of evidence to support the nonmoving party's case." App. 6A. Although the court of appeals affirmed the district court's grant of summary judgment on a ground different than that adopted by the district court, it followed well-settled authority in so doing. The court below noted that "summary judgment may be affirmed on grounds other than the basis of the district court's decision." App. 9A (citing *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 193 (5th Cir. 1990); *see also Matter of Lewisville Properties, Inc.*, 849 F.2d 946, 950 (5th Cir. 1988)). The cases the court of appeals cited explicitly state the rule that a court of appeals may affirm summary judgment on grounds other than the ground the district court adopted, but only if those grounds were actually presented to the district court. *See Howell Hydrocarbons*, 897 F.2d at 193 & n.7 (noting that it was "affirm[ing] the summary judgment on a ground for which [the moving party] received sufficient notice"); *Lewisville Properties*, 849 F.2d at 950-51. *Compare also Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1146 (5th Cir. 1993) ("Where, as here, the movants for summary judgment advanced several independent arguments in district court in support of their motions for summary judgment, we will affirm if any of those grounds support the district court's decision.").

3. Therefore, the petition presents, at most, a claim that the court of appeals erred in applying these well-settled principles to the facts of this case. But even as

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Fano v. O'Neill, 806 F.2d 1262, 1265 (5th Cir. 1987) (quoting Justice White); *Beatty v. WMATA*, 860 F.2d 1117, 1120-21 (D.C. Cir. 1988); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 n. 19 (11th Cir. 1991) (en banc).

to this narrow claim—that the Fifth Circuit affirmed the grant of summary judgment on a ground as to which petitioner had no notice—the petition is without merit. As the Fifth Circuit noted, Conti and Continental pleaded the defense of qualified privilege (App. 11A), and, as petitioner concedes, they raised that issue explicitly in their brief in support of summary judgment in the district court, and petitioner responded to that argument in the district court (*see* Pet., pp. 10, 11). Moreover, the Fifth Circuit did not surprise petitioner with its holding. Petitioner admits that Conti and Continental focused their brief to the Fifth Circuit on the qualified privilege issue. Pet., pp. 12-15. Petitioner both argued to the Fifth Circuit that the issue had not been properly raised in the district court (Pet., pp. 15-16) and marshaled all of the evidence in the record that he believed would require a trial with respect to qualified privilege (*id.*, pp. 16-17). The Fifth Circuit held that evidence to be insufficient to create a genuine issue of material fact. App. 9A-13A.

Petitioner therefore seeks certiorari in circumstances that (unless this Court also were to grant certiorari on a question solely of state law, *see* pp. 13-16 *infra*) give him no possibility of prevailing on remand. Even if petitioner were to prevail on the merits of this procedural question and establish that Conti and Continental had failed adequately to raise the issue of qualified privilege before the district court, on remand petitioner would still suffer summary judgment because the court of appeals has already considered petitioner's evidence and found it wanting on the merits. Petitioner is not entitled to additional discovery and does not argue (and has never argued) that additional discovery was necessary before summary judgment could be granted. *Compare* Fed. R. Civ. P. 56(f). Certiorari is not warranted in these circumstances.

4. Finally, petitioner's second suggested issue for review on certiorari—that the court of appeals' decision contravenes *New York Times v. Sullivan*, 376 U.S. 254

(1964)—in fact raises only an issue of Texas state law. No first amendment issues are presented in this case. As petitioner candidly admits: "This case was decided under the Texas law of defamation and malice." Pet., p. 25. Although Texas common law includes an "actual malice" element, that element has nothing to do with the first amendment "actual malice" standard articulated in *New York Times*. Indeed, petitioner concedes, although he attempts at times to argue otherwise, that the Texas law on qualified privilege is not identical to the *New York Times* actual malice test. *See* Pet., p. 26 ("Texas muddies the waters slightly, sometimes making it appear that the 'serious doubts' element applies to knowingly false statements as well as to those spoken with reckless disregard for the truth") (citing *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771, 771-72 (Tex. 1994)). This Court should not grant certiorari on an issue solely of state law. "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *accord Butner v. United States*, 440 U.S. 48, 57-58 (1979); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

Petitioner's reliance on *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989), to assert that Conti and Continental were not entitled to summary judgment (Pet., pp. 26-27) is misplaced, for petitioner confuses the substantive aspects of the Texas doctrine of qualified privilege with Texas procedure on summary judgment. In federal courts in diversity cases, procedural matters are governed by federal, not state, law. *Hanna v. Plumer*, 380 U.S. 460, 465, 473 (1965). As *Casso* acknowledges, "Summary judgments in federal courts are based on very different assumptions, with different purposes, than summary judgments in Texas." 776 S.W.2d at 555-56.[12] Petitioner's assertion

[12] Discussing *Celotex*, the Texas court noted that, in the federal system, summary judgment is " 'not disfavored' " but is an " 'in-

that *Casso* determined for the court of appeals the "showing" that Conti and Continental were required to make (*see* Pet., p. 27) is thus unavailing. On the other hand, there is no dispute as to the applicable substantive rule: petitioner had the burden to establish actual malice to overcome the qualified privilege. *See Hagler,* 884 S.W.2d at 771-72.

In all events, within the appropriate federal procedural rules, the Fifth Circuit correctly construed and applied Texas law to the facts of this case. As the Fifth Circuit held, Texas requires that the plaintiff demonstrate "actual malice" in order to overcome a qualified privilege and that "[a] finding of such malice requires 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" App. 10A (quoting *Hagler,* 776 S.W.2d at 571). As the Fifth Circuit also noted, Texas law requires the plaintiff to demonstrate actual malice by "clear evidence." *See* App. 10A-11A.

Petitioner contends that Conti defamed him by stating to Merrill Lynch that he was dishonest, had caused huge losses at CAH, and had improperly allocated trades for the benefit of his father and other select customers. Pet., p. 6. Petitioner does not dispute that such alleged statements were qualifiedly privileged. Rather, he attempts to suggest that he could overcome the privilege by demonstrating "actual malice." But, the only evidence to which petitioner pointed below (and the only evidence to which he points before this Court) that even remotely bears on the question of actual malice is the "fact" that Conti representatives met with Merrill Lynch and stated their suspicions *before* an audit report on CAH had confirmed petitioner's wrongdoing. *See* App. 11A; Pet., pp.. 16-17, 27. But that fact,

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tegral part'" of procedure, whereas, in Texas, the courts "use summary judgments merely 'to eliminate patently unmeritorious claims and untenable defenses.'" *Id.* at 556 (quoting *Celotex,* 477 U.S. at 327; *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 678 n.5 (Tex. 1979)).

as the Fifth Circuit recognized, does not establish that Conti's representatives had actual knowledge that the allegedly defamatory statements were false or that they acted with reckless disregard of the truth or falsity of those statements. *See* App. 11A.

Petitioner's central complaint is that Conti and Continental did not provide anything more than an affidavit and deposition testimony establishing that Conti's representatives acted in good faith. *See* Pet., pp. 26-27.[18] And, petitioner relies on *St. Amant v. Thompson*, 390 U.S. 727 (1968), to assert that a party's testimony that he published a statement in good faith is not sufficient to defeat a defamation claim. *See* Pet., pp. 25-26. But, *St. Amant*, of course, considered the actual malice question in the context of the first amendment, not a qualified privilege under state law, and it is, therefore, not controlling in this case. Even if it did apply, moreover, it would support the court of appeals' decision. Although this Court did hold that, at a trial on the merits, "[t]he defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true" (390 U.S. at 732), this Court made clear that the plaintiff must have "*evidence*" that would suggest "that the defendant in fact entertained serious doubts as to the truth of this publication" (*id.* at 731). The Fifth Circuit's decision here rested on *petitioner's* inability to produce any such evidence sufficient to carry his burden of proof. The Fifth Circuit's decision was correct, and certiorari should not be granted to review this question.

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[18] Petitioner also attempts to create the impression that Conti and Continental somehow presented "new" evidence to the court of appeals. *See* Pet., pp. 18, 15, 24. The evidence to which Conti and Continental referred in the court of appeals was part of the record before the district court and the record on appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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